Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/34316/2013
IA/34379/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 April 2014	**On 8 April 2014**
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Before

THE HONOURABLE MR JUSTICE JEREMY BAKER SITTING AS A DEPUTY JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PRIYA KAMAL RAJ
SRINIVAS AVULA

Respondents

Representation:

For the Respondents: Mr J Chipperfield of counsel instructed by Advice Wise Solicitors
For the Appellant: Mr G Saunders, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Priya Kamal Raj is 28 years of age, having been born on 11 September 1985 and Srinivas Avula is 33 years of age, having been born on 19 April 1980. They are married to each other and are both citizens of India.

2. Mrs Raj obtained various nursing qualifications in India and wished to obtain higher qualifications in the United Kingdom. To this end she obtained leave to enter the United Kingdom as a Tier 4 (General) Student under the points-based system and did so on 28 April 2011.

3. Thereafter, she was granted leave to remain in the same capacity until 25 June 2013 and throughout this period Mr Avula had leave to enter and remain as her dependant.

4. Whilst in the United Kingdom, Mrs Raj obtained an MSc in Advanced Nursing and decided that she wished to obtain an MBA. To this end, on 24 June 2013, she applied for further leave to remain in the same capacity, as did Mr Avula.

5. On 5 August 2013, the Secretary of State for the Home Department refused the applications. Mrs Raj's application was refused because of failure to meet the Maintenance (Funds) requirements and Mr Avula's application was refused because he was a dependant of an individual who had been refused leave to remain.

6. Mrs Raj and Mr Avula appealed against these decisions to the First-tier Tribunal who allowed their appeals in a decision promulgated on 3 February 2014. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the First-tier Tribunal.

7. The grounds of appeal before us are two fold: firstly, that the First-tier Tribunal failed to appreciate that where an individual fails to obtain leave to remain under the Immigration Rules, it is only if there are compelling circumstances not sufficiently recognised under the Rules that an individual should be granted leave to remain on Article 8 grounds, and; secondly, the factors taken into account by the First-tier Tribunal did not amount to compelling circumstances.

8. At the hearing before the First-tier Tribunal, it was conceded that Mrs Raj's application under the Immigration Rules was bound to fail due to non-compliance with the Maintenance (Funds) requirements. The nature of the non-compliance was that the bank statements which she had provided with her application failed to demonstrate that she had £3,200 maintenance during the 28 day period between 11 May 2013 and 7 June 2013, and her financial sponsor was not one who was entitled to act as such under the Rules.

9. The First-tier Tribunal said that "On that basis it could only be dealt with under Article 8". It then identified what it considered to be the main issue in the case, namely "…whether or not the first appellant is a genuine student and is here with her husband for the purposes of enhancing her career". The First-tier Tribunal then went on to make various findings of fact, namely that Mrs Raj had successfully completed her MSc in Advanced Nursing and that she genuinely desired to obtain an MBA. The First-tier Tribunal took into account documents which showed that Mrs Raj had the requisite funds available and found that, had it not been for flooding in India at the material time, those documents could have been provided to the Secretary of State. Furthermore, Mrs Raj had not only already commenced her MBA

course, but had paid £6,000 towards it, which would be lost if she did not complete the course.

10. In relation to the decision of the Secretary of State, the First-tier Tribunal concluded that "Applying the well-known Article 8 jurisprudence in this respect I am satisfied that this was a disproportionate interference with her Article 8 rights".

11. Undoubtedly, there was no express reference by the First-tier Tribunal to the decisions of *R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and Shahzad (Article 8: legitimate aim) [2014] UKUT 85.* Nor do we consider that it was likely that the reference to "well-known Article 8 jurisprudence" was a reference to these decisions. However, and more to the point, we cannot detect that the First-tier Tribunal considered the effect of these decisions, namely that the Immigration Rules are designed to be a comprehensive code for the consideration of an individual's Article 8 rights and it is only if there are compelling circumstances, beyond those envisaged under the Rules, that an individual may be able to succeed on Article 8 grounds outside the Rules.

12. Whereas we appreciate that those decisions were concerned with family life under Article 8, we do not consider that this precludes their materiality to the consideration of private life under article 8 in the present case.

13. We consider that this omission to direct itself in accordance with these decisions was an error of law on the part of the First-tier Tribunal, and its effect was that the First-tier Tribunal failed sufficiently to appreciate the hurdle which had to be met by Mrs Raj, if she was to seek to overturn the decision of the Secretary of State on Article 8 grounds outside the Rules.

14. We turn then to consider those grounds which the First-tier Tribunal held to have been established. Essentially they amounted to the fact that the First-tier Tribunal was itself satisfied that Mrs Raj did have the funds available to her, and that having embarked on her MBA course it concluded that it would be disproportionate not to allow her leave to remain to complete it.

15. Whilst we have some sympathy with these sentiments, regrettably they do not take into account other jurisprudence in this area. Not only does S.85A of the Nationality, Immigration and Asylum Act 2002 mean that decisions of the Secretary of State are to be considered by the Tribunal on the basis of the documentation provided with the application, but it has been made clear in a number of decisions that a Tribunal is not entitled to allow appeals because of near misses in the documentation including *Miah v Secretary of State for the Home Department [2012] EWCA Civ 261, Alam v SSHD [2012] EWCA Civ 960 and Raju v SSHD [2013] EWCA Civ 754.*

16. Whilst we appreciate that in this case the First-tier Tribunal also held that, but for the floods in India the documentation could have been available, we also note that not only had Mrs Raj delayed in making her application to the last moment, but the documentation from the sponsor was in any event defective. In these circumstances, we do not consider that this factor, taken singly or together with the others,

amounted to a sufficiently compelling reason for consideration of Mrs Raj's Article 8 rights outside the Rules.

17. As Lord Carnwath made clear in *Patel v SSHD [2013] UKSC 72* at paragraph 57:

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for 'common sense' in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

18. Accordingly, not only have we reached the conclusion that the decision of the First-tier Tribunal exhibited an incorrect approach to the issue that was raised before it on appeal, but we also consider that the First-tier Tribunal was not entitled to conclude that the identified factors relating to Mrs Raj's Article 8 rights were ones capable of being sufficiently compelling to have merited consideration outside the Rules.

19. Accordingly, as we have concluded that the First-tier Tribunal erred in law we set aside the decision of that Tribunal. We remake the decision and dismiss the appeals of both Mrs Raj and Mr Avula which stand or fall together.

Signed Date

The Honourable Mr Justice Jeremy Baker sitting as a Deputy Judge of the Upper Tribunal